THE HONORABLE MARSHA PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington Limited Liability Company, Plaintiff, v. EFINANCIAL, LLC, a Washington Limited Liability Company, f/k/a PRIMEPLAN, LLC, a Washington Limited Liability Company, also d/b/a TERMFINDER.COM, POLICYMATCH.COM; MICHAEL and KATHLEEN ROWELL, and their marital community; and JOHN DOES I-X, Defendants.	NO. CV 06-1118 MJP DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT FOR INJUNCTIVE RELIEF [Hearing Date: July 13, 2007]

COME NOW Defendants EFinancial, LLC (f/k/a PrimePlan, LLC, also d/b/a Termfinder.com and PolicyMatch.com), and Michael and Kathleen Rowell, by and through their attorneys of record, and respond in opposition to Plaintiff's Motion for Partial Summary Judgment as follows.

I. PRELIMINARY MATTER

In the caption of Plaintiff's Motion for Partial Summary Judgment for Injunctive Relief, opposing counsel erroneously identifies both Omni Innovations, LLC and James S. Gordon, Jr. as

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plaintiffs in this lawsuit. Presumably this was unintentional. Nonetheless, it is important that the proper parties be recognized in the caption for purposes of this motion.

II. FACTUAL SUMMARY

Plaintiff Omni Innovations, LLC filed suit against the above-named Defendants on August 3, 2006, alleging violations of the CAN-SPAM Act, 15 U.S.C. § 7701 et seq., the Washington Commercial Electronic Mail Act, RCW 19.190.010 et seq., and the Washington Consumer Protection Act, RCW 19.86 et seq. Specifically, Plaintiff alleges that from August 2003 through May 2006, Defendants initiated the transmission of emails, or conspired with others to transmit emails, that violated these statutes by misrepresenting or obscuring information in identifying the point of origin or transmission path, or contained header information that was materially false or misleading.

By its Motion, Plaintiff seeks a permanent injunction against Defendants. Plaintiff asserts that the material facts are not in dispute when, in fact, all material facts are in dispute. Moreover, Plaintiff bears the burden of proof on each and every fact necessary to support its claims - a burden Plaintiff fails to meet.

Plaintiff erroneously states that, "It is indisputable that Plaintiffs Omni Innovations LLC and James S. Gordon Jr. (hereafter collectively "Gordon") have received numerous commercial electronic mail messages (hereinafter "spam") transmitted by, or on behalf of Defendants." As discussed above, James S. Gordon, Jr. is not a plaintiff in this lawsuit. Presumably, Plaintiff makes this mistake because Omni and/or Gordon have filed numerous "spam" cases in Washington state and federal courts, and several nearly identical motions for partial summary judgment against various defendants in those cases. *See, e.g.*, Declaration of Matthew R. Wojcik, Exhibit 1.

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In any event, Defendants deny that they sent commercial email messages to Plaintiff (or more specifically, email addresses serviced by Omni), let alone illegal email messages. Defendants further dispute that they sent or caused to be sent any emails that were in violation of federal or state law.

Plaintiff argues that Gordon repeatedly requested that Defendants stop sending spam to him by a variety of means, but despite these attempts, Defendants continued to send Gordon spam. Again, Gordon is not a plaintiff in this action. Further, Plaintiff offers no evidence that "ingtonaden@aberystwyth.com" or "SuperTV@genignantcause.com" (the addresses to which Gordon emailed his "Demand for Cessation of Emails") are in any way related to Defendants[1], that Plaintiff sent its "Notice of Offer to Receive Unsolicited Commercial Email (SPAM)" to Defendants, that Defendants received the "Notice of Offer," or that Defendants were contacted by Plaintiff in any other manner.

The Declaration of James S. Gordon, Jr., filed in support of Plaintiff's Motion, is similarly problematic. Gordon complains of having been "plagued by spam for well over eight years" and how it has "spiraled out of control, consuming more and more of my time and resources." Plaintiff portrays a long and bloody crusade against unsolicited email but fails to connect the "onslaught of spam" to these Defendants. In addition to the fact that Gordon is not a party to this lawsuit, Omni's own Complaint alleges that it did not become an "Internet access provider" until May of 2005. *See* Plaintiff's Complaint, ¶7. Thus, any emails received from August 2003 to May 2005 would be irrelevant to this Motion (and Plaintiff's claims). Moreover, although Gordon asserts that Defendants have continued to send "unlawful spam" to him, this is a factual

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[1] Moreover, these emails respectively contain the subject line "lots of pain reivers [sic] for you to choose to cure the pain" and "from" line, "SuperTV," which facially are inconsistent with Defendants' business of insurance sales.

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issue disputed by Defendants and unsubstantiated by Plaintiff in its Motion.

Defendants' expert has reviewed Plaintiff's Motion and supporting documents, as well as publicly available records. (Declaration of Larry G. Johnson). The public records reveal that Omni is not the owner of at least eight of the 11 domains for which it seeks a permanent injunction. *Id.* Specifically, the records show conclusively that only gordonworks.com and itdinotendright.com are owned by Omni Innovations, LLC. *Id.* Two domain names for which Plaintiff seeks an injunction, but which it does not own, are ewaterdragon.com and anthonycentral.com. Plaintiff offers three alleged emails in support of its Motion. *See* Gordon Decl., Ex. B. One is addressed to ewaterdragon.com (jim@ewaterdragon.com) and two are to anthonycentral.com (ant@anthonycentral.com and chuck@anthonycentral.com). Beyond the fact that Plaintiff fails to establish ownership of these email addresses, and thus standing, Plaintiff offers no evidence whatsoever to substantiate its claim that any of the Defendants sent these alleged emails. In fact, the alleged email sent to jim@waterdragon.com states on its face that it is from Lifeinsurancerates@retailsalesrptoutletdirect.com, and the other two are from Mark@desdinmtgk.com. Plaintiff offers no proof at all why these sender addresses should not be taken at face value, or how these three alleged emails can be linked to any of the Defendants.

III. ARGUMENT

A. Summary Judgment Standard

A moving party is entitled to summary judgment only when there is no genuine issue of as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Bagdadi v. Nazar,

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84 F.3d 1194, 1197 (9th Cr. 1996).

A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. Anderson, 477 U.S. at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-252. The moving party bears the burden of showing that there is no evidence supporting an element essential to the nonmovant's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party to show that there is a genuine issue for trial. Anderson, 477 U.S. at 250.

B. Plaintiff is Not Entitled to Injunctive Relief.

1. Plaintiff Fails to Establish Requisite Elements of Liability Under CAN-SPAM.

Plaintiff filed this lawsuit against Defendants based in part on the federal "CAN-SPAM Act", 15 U.S.C. § 7701 et seq. Specifically, Plaintiff bases its Motion for Partial Summary Judgment for (Permanent) Injunctive Relief on the following provision:

> A provider of Internet access service adversely affected by a violation of section 7704(a)(1) of this title, 7704(b) of this title, or 7704(d) of this title, or a pattern or practice that violates paragraph (2), (3), (4) or (5) of section 7704(a) of this title, may bring a civil action in any district court of the United States with jurisdiction over the defendant --
>
> (A) to enjoin further violation by the defendant; or
>
> (B) to recover damages in an amount equal to the greater of --
>
> (i) actual monetary loss incurred by the provider of Internet access service as a result of such violation; or
>
> (ii) the amount determined under paragraph (3).

15 U.S.C. §7706(g)(1).

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Despite Plaintiff's suggestion, not all commercial emails are illegal. The applicable law sets forth the requirements of acceptable email messages, as well as the prohibitions:

> **(a) Requirements for transmission of messages.** (1) Prohibition of false or misleading transmission information. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message, or a transactional or relationship message that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this paragraph --
>
> > (A) header information that is technically accurate but includes an originating electronic email address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading;
> > (B) a "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and
> >
> > (C) header information shall be considered materially misleading is it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin
>
> * * *
>
> (3) Including of return address or comparable mechanism in commercial electronic mail. (A) In general. In general. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed that --
>
> > (i) a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and
> >
> > (ii) remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

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> (4) Prohibition of transmission of commercial electronic mail after objection. (A) In general. If a recipient makes a request using a mechanism provided in paragraph (3) not to receive some or any commercial electronic mail messages from such sender, then it is unlawful --
>
> > (i) for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, or a commercial electronic mail message that falls within the scope of the request; . . . .

15 U.S.C. § 7704.

The CAN-SPAM Act is designated to be enforced by government entities. A limited private right of action is given to Internet access providers only. 15 U.S.C. § 7706. As outlined in the Virtumundo decision (discussed below), there is significant doubt whether Plaintiff even qualifies as an "Internet Access Provider." However, this question need not be answered to dispense with this Motion. Here, Plaintiff relies specifically on an alleged violation of § 7704(a)(4), based on an alleged pattern or practice by Defendants to continue sending electronic mail messages to Plaintiffs despite repeated requests that such messages not be sent.

Plaintiff makes no effort to address the requisite elements for violation of the Act. Rather, Plaintiff simply concludes that it is entitled to a permanent injunction because it allegedly received emails from Plaintiff after making efforts to notify Defendants. As discussed in the "Factual Summary" section above, and in the attached Declaration of Larry G. Johnson, (1) Plaintiff fails to establish that the three emails were sent by or on behalf of Defendants; and (2) Plaintiff fails to provide evidence that it made an appropriate request to stop receipt of any emails from Defendants.

2. Plaintiff Lacks Standing to Bring Claims Under the CAN-SPAM Act.

As a threshold issue, a legitimate question exists as to whether Omni has standing

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to bring claims under the CAN-SPAM Act. The Federal District Court for the Western District of Washington recently ruled that Omni does not have standing to bring a claim under the CAN-SPAM Act and dismissed a similar case to the case herein. The Court's ruling was based on the conclusions that Omni may not meet the definition of an "Internet access provider," and Omni had not suffered the requisite harm, or "adverse effect," to pursue a private action under the CAN-SPAM Act. *See*, Order in Gordon v. Virtumundo, Inc., et al., United States District Court for the Western District of Washington at Seattle, Case No. 06-0204-JCC, a copy of which is attached as Exhibit 2 to the Declaration of Matthew R. Wojcik. Defendants submit that Judge Coughenour's decision in Gordon v. Virtumundo operates as collateral estoppel on the same issue in this case, and Defendants intend to file a motion to dismiss Plaintiff's claims on the same bases as those ruled upon by Judge Coughenour.

3. Plaintiff Fails to Establish Requisite Factors for Permanent Injunction.

Even if Plaintiff has standing to sue under the CAN-SPAM Act, Plaintiff has not proven, nor can it prove, that Defendants violated the Act. Plaintiff's unsupported assertions simply do not establish its causes of action.

Noticeably absent from Plaintiff's Motion is any discussion regarding the legal standards for issuance of a permanent injunction. Defendants suggest that such discussion is absent because Plaintiff knows it cannot meet the stringent standards for a permanent injunction. Instead, Plaintiff attempts to bypass the requirement that it prove its case by simply stating that the facts are as Plaintiff wishes the facts to be. Moreover, Plaintiff employs the misleading argument that if Defendants do not intend to send

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commercial emails to Plaintiff, they would simply agree to the permanent injunction. It is not Defendants' role to make Plaintiff's case for it, and Plaintiff's inability to do so requires that Plaintiff's Motion be denied. Moreover, Defendants should not have to incur the time and expense of being motioned into Court by Omni every time it *asserts* an email was received in violated on an injunction, all before Plaintiff has proven a single element of its case.

To obtain a permanent injunction, a party must prove four factors: "(1) that is has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 126 S.Ct. 1837, 1839 (2006). Further, whether to grant or deny permanent injunctive relief is within the equitable discretion of the district court. *Id.* To qualify for permanent injunctive relief, a plaintiff must establish actual success on the merits, that they will sustain irreparable injury and that remedies at law are inadequate, and that the balance of equities favors injunctive relief. Thus, a plaintiff must actually prove its own case as well as the circumstances that entitle it to injunctive relief as opposed to other legal remedies. Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998).

Plaintiff points to the unpublished decision of America Online, Inc. v. Smith, 2006 WL 181674 (E.D. Va. 2006) as support for its entitlement to permanent injunctive relief. What Plaintiff fails to note, however, is that the plaintiff in America Online had established "success on the merits" via court order following the defendant's refusal to

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participate in [the] case, willfully disregarding their discovery obligations and failing to comply with multiple court orders." *Id.* As a result of Defendants' failure to participate in discovery and their blatant refusal to obey court orders, the court granted Plaintiff's motion for terminating sanctions, ordering that Defendants "shall not oppose any claim or introduce evidence and striking the affirmative defenses." *Id.* Thus, there could be no genuine issue of material fact regarding liability because the court had directed liability against the defendant based on defendant's misconduct. The court did not impose a permanent injunction before the plaintiff proved its case - - which is exactly what Plaintiff asks this Court to do by means of this Motion.

The inquiry should end there and Plaintiff's Motion should be denied. However, in addition to Plaintiff not proving success on the merits, Plaintiff has also failed to establish irreparable harm and the inadequacy of monetary damages. Indeed, Plaintiff's Complaint seeks statutory damages, not actual damages. Moreover, the Gordon v. Virtumundo court, evaluating Omni's claim and evidence over the same period of time, found that Omni had not established adverse effect, let alone irreparable harm. (Wojcik Decl., Ex. 2, p.13-14). In fact, Gordon testified in the Virtumundo case that he keeps email accounts active to retain the benefits of receiving spam for "research" and obtaining financial settlements from spammers. (Wojcik Decl., Ex. 2, p.7). Indeed, *all* of Omni and Gordon's income and/or revenue for the years 2006 and 2007 has been from spam-related settlements. (Wojcik Decl., Ex. 2, p. 7-8).

The attached Declaration of expert Larry Johnson addresses many of the specific claims of "damage" contained in Gordon's declaration, all leading to the conclusion that Plaintiff has failed to establish that he has suffered adverse impact or irreparable harm

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and that his claims for damages are either trivial or self-inflicted. It is unclear whether the "damages" claimed by Mr. Gordon in his declaration are personal to him (a non-party) or the Plaintiff Omni. Moreover, by making these bulk declarations against all defendants in all Omni/Gordon cases, Plaintiff necessarily creates a cumulative effect of alleged damages. Because Plaintiff makes no effort to apportion its alleged damages to the Defendants herein, the Court has no basis to determine whether the alleged damages, on their own, equate to "adverse impact" or "irreparable harm."

IV. CONCLUSION

There are numerous issues of fact underlying Plaintiff's Motion, each of which precludes granting the Motion, including but not limited to the following: (1) whether Defendants sent any electronic mail messages to Omni; (2) whether Defendants procured the sending of electronic mail messages to Omni; (3) whether such emails, if any, violated applicable law; (4) whether Omni properly requested Defendants not to send Plaintiff electronic mail messages and, if so, whether Defendants ignored the requests; and (5) whether Omni can establish sufficient damages or demonstrable harm. For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Innovations, LLC.

DATED at Seattle, Washington this 9th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2007, I caused to be served via email, original via mail, the foregoing Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment for Injunctive Relief to the following person:

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